Supreme Court, U.S.
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No. 05-894

IN THE

Supreme Court of the United States

KERRY NEAL MULLINS,

Petitioner,

v.

PEOPLE OF THE STATE OF ALABAMA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE ALABAMA COURT OF CRIMINAL APPEALS

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether custodial statements which arise without a finding of probable cause, nor the issuance of a warrant, nor the presentment of an indictment are distinguishable from *Brown v. Illinois*, 422 U.S. 590, 95 S. Ct. 2254 (1975), and thus, admissible merely because defendant has been given Miranda warnings prior to making statements.

Petitioner, Kerry Neal Mullins, respectfully prays that a writ of certiorari issue to review the judgment and order of the Alabama Criminal Court, dated June 10, 2005.

OPINIONS AND PROCEEDINGS BELOW

A copy of the Memorandum after Remand by the Court of Criminal Appeals of Alabama, dated June 10, 2005, affirming the Trial Court is attached hereto as Appendix "A."

A copy of the Opinion and Order of the Supreme Court of Alabama, dated April 22, 2005, granting the Writ of Certiorari to the Alabama Court of Criminal Appeals, is attached as Appendix "B."

A copy of the Application for Rehearing to the Alabama Court of Criminal Appeals, dated October 29, 2004, is attached hereto as Appendix "C".

A copy of the Application for Rehearing, dated July 1, 2005, from the Criminal Court of Appeals of Alabama, that overruled the application is attached hereto as Appendix "D."

JURISDICTION

A copy of the Certificate of Judgment of the Supreme Court of Alabama, dated August 12, 2005, which denied the Petition for Writ of Certiorari to the Court of Criminal Appeals is attached hereto as Appendix "E."

Jurisdiction is conferred upon this Court by 28 U.S.C.A. § 1257(a).

CONSTITUTIONAL PROVISIONS

The following provision of the United States Constitution are involved: U.S. Const. Amends. IV, V, XIV.

STATEMENT OF THE CASE

On November 17, 2003, petitioner entered a best interest plea reserving for appeal the denial of his motion to suppress post-Miranda custodial statements.

On November 1, 1999, Caption Rigney of the Alabaster Police Department subpoenaed petitioner to the municipal police station. **(R.39,50)** Petitioner was a suspect to felony sodomy based on a conversation that the Police Captain had with a Department of Human Resources social worker. **(R.52)** Upon petitioner's arrival, he was taken to an interview room, the door was shut and without being charged with a crime was presented with a waiver and read his Miranda rights. **(R.39-40)**

Captain Rigney told the petitioner, Kerry Mullins, that the victim was interviewed by a Department of Human Resources investigator, and that the victim's story was believable. The petitioner, Kerry Mullins, had denied the allegations. **(R.42-3)** The Captain told the petitioner, Kerry Mullins, that he did not believe him. **(R.42-3)** The petitioner, Kerry Mullins, changed his statement. **(R.42-3)**

The Alabama Court of Criminal Appeals dismissed the appeal stating the petitioner did not reserve the right to appeal his plea.

The Supreme Court remanded on April 22, 2005. On remand, the Alabama Court of Criminal Appeals affirmed relying on *Bram v. United States* 168 U.S. 532, 18 S. Ct. 183, 42 L. Ed. 568 (1897); *Boulden v. Holman*, 394 U.S. 478, 480, 89 S. Ct. 1138, 1139-40, 22 L. Ed. 2d 433 (1969); and *Grenwald v. Wisconsin* 390 U.S. 519, 521, 88 S. Ct. 1152, 1154, 20 L. Ed. 2d 77 (1968), to determine that the inculpatory statement was voluntary. On appeal, the Alabama Supreme Court denied the writ of certiorari.

In affirming, the Alabama Court of Criminal Appeals did not include the stark fact of custodial interrogation (R.78, 16, 17, 39, 39-40, 50, 62, 55, 62, 47, 60-1), absent probable cause, and the use of a subpoena to gain custody of Mullins. Rather, the Court analyzed Miranda with regard to Mullin's Fifth Amendment rights, effectively curtailing an examination of Miranda in the context of Mullins' Fourth Amendment rights.

REASONS FOR GRANTING THE PETITION

The Miranda Rule is generally employed to protect Fifth Amendment rights against the compulsion inherent in custodial surroundings. *Miranda v. Arizona*, 384 U.S. 457 (1966). The exclusionary rule, however, when utilized to effect the Fourth Amendment serves interests and policies that are distinct from those it serves under the Fifth. *Brown v. Illinois*, 422 U.S. 590 (1975).

In the case at bar, the record is clear that respondent was induced, into custody, by an act of the police. (R-39) The difference between being handcuffed and driven to the police station, *Brown*, *id.* at 93, and being compelled by legal process, a subpoena, lie in semantics, only. The Miranda warnings in no

way inform a person of his Fourth Amendment rights, including, his right to be released from unlawful custody following an arrest made without a warrant or without probable cause. *Brown v. Illinois*, 422 U.S. 590 (1975).

The question presented is important. A citizen can be detained, placed in custody or illegally arrested in many ways. In *Brown v. Illinois*, 422 U.S. 590, 95 S. Ct. 2254, this Court examined the traditional illegal arrest, "Don't move. You are under arrest." *Brown*, at 594.

In the instant case, detention occurred at the moment Mullins entered the interview room, albeit by more nefarious means – the issuance of a subpoena without a finding of probable cause, nor warrant, nor the benefit of the simple statement, "You are under arrest." Arrests made without warrant or without probable cause for questioning or "investigation" would be encouraged by the knowledge that evidence derived therefrom could well be admissible at trial by the simple expedient of giving Miranda warnings. *Brown*, at 602.

In turn, our core Fourth Amendment protections are eroded.

CONCLUSION

Based upon the foregoing points and authorities, the Petitioner respectfully requests this Honorable Court to grant the within writ and reverse the judgment of the Court below.

Respectfully submitted,

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APPENDIX

APPENDIX A — MEMORANDUM OF THE COURT OF CRIMINAL APPEALS, STATE OF ALABAMA DATED JUNE 10, 2005

COURT OF CRIMINAL APPEALS
State of Alabama
Judicial Building, 300 Dexter Avenue
P. O. Box 301555
Montgomery, AL 36130-1555

MEMORANDUM

On Remand from the Alabama Supreme Court

CR-03-0910 Shelby Circuit Court CC-02-744

Kerry Neal Mullins v. State of Alabama

Baschab, Judge.

The appellant pled guilty to first-degree sodomy, a violation of §13A-6-63(a)(3), Ala. Code 1975. The trial court sentenced him to serve a term of fifteen years in prison. The appellant appealed his conviction to this court. On August 27, 2004, we dismissed his appeal in an unpublished memorandum on the ground that he had not reserved the right to appeal his guilty plea. *See Mullins v. State*, (CR-03-0910, August 27, 2004) __ So. 2d __ (Ala. Crim. App. 2004) (table). On April 22, 2005, the Alabama Supreme Court reversed this court's judgment, held that the appellant had reserved the right to appeal his guilty plea, and remanded the case to this court. *See Mullins v. State*, [Ms. 1040239, April 22, 2005] __ So. 2d (Ala. 2005).

Appendix A

The appellant argues that the trial court erroneously denied his motion to suppress the statement he made to law enforcement officers. When he entered his guilty plea, he reserved the right to appeal the denial of his motion to suppress.

> "It has long been held that a confession, or any inculpatory statement, is involuntary if it is either coerced through force or induced through an express or implied promise of leniency. *Bram v. United States*, 168 U.S. 532, 18 S. Ct. 183, 42 L. Ed. 568 (1897). In *Culombe*, 367 U.S. at 602, 81 S. Ct. at 1879, the Supreme Court of the United States explained that for a confession to be voluntary, the defendant must have the capacity to exercise his own free will in choosing to confess. If his capacity has been impaired, that is, 'if his *will has been overborne*' by coercion or inducement, then the confession is involuntary and cannot be admitted into evidence. *Id.* (emphasis added).
>
> "The Supreme Court has stated that when a court is determining whether a confession was given voluntarily it must consider the 'totality of the circumstances.' *Boulden v. Holman*, 394 U.S. 478, 480, 89 S. Ct. 1138, 1139-40, 22 L. Ed. 2d 433 (1969); *Greenwald v. Wisconsin*, 390 U.S. 519, 521, 88 S. Ct. 1152, 1154, 20 L. Ed. 2d 77 (1968); see *Beecher v. Alabama*, 389 U.S. 35, 38, 88 S. Ct. 189, 191, 19 L. Ed. 2d 35 (1967). Alabama courts have also held that a court must

consider the totality of the circumstances to determine if the defendant's will was overborne by coercion or inducement. See *Ex parte Matthews*, 601 So. 2d 52, 54 (Ala.) (stating that a court must analyze a confession by looking at the totality of the circumstances), cert. denied, 505 U.S. 1206, 112 S. Ct. 2996, 120 L. Ed. 2d 872 (1992); *Jackson v. State*, 562 So. 2d 1373, 1380 (Ala. Crim. App. 1990) (stating that, to admit a confession, a court must determine that the defendant's will was not overborne by pressures and circumstances swirling around him); *Eakes v. State*, 387 So. 2d 855, 859 (Ala. Crim. App. 1978) (stating that the true test to be employed is 'whether the defendant's will was *overborne* at the time he confessed') (emphasis added). Thus, to determine whether McLeod's confession was improperly induced, we must determine if his will was 'overborne' by an implied promise of leniency.

". . .

". . . Thus, the test of involuntariness of a confession, or other inculpatory statement, is not whether the defendant bargained with the police, but whether in his discussions with the police, which may have included bargaining, the defendant's will was overborne by 'apprehension of harm or hope of favor.' See *Gaddy*, 698 So. 2d at 1154 (quoting *Ex parte Weeks*, 531 So. 2d 643, 644 (Ala. 1988)); *Culombe*, 367 U.S. at 602, 81

> S. Ct. at 1879; *Jackson*, 562 So. 2d at 1380. To determine if a defendant's will has been overborne, we must assess 'the conduct of the law enforcement officials in creating pressure and the suspect's capacity to resist that pressure'; '[t]he defendant's personal characteristics as well as his prior experience with the criminal justice system are factors to be considered in determining [the defendant's] susceptibility to police pressures.' *Jackson*, 562 So. 2d at 1380-81 (citations omitted)."

McLeod v. State, 718 So. 2d 727, 729-30 (Ala. 1998) (footnote omitted). Further,

> "'[c]onflicting evidence given at [a] suppression hearing presents a credibility choice for the trial court.' *Atwell v. State*, 594 So. 2d 202, 212 (Ala. Cr. App. 1991), cert. denied, 594 So. 2d 214 (Ala. 1992). '[A] trial court's ruling based upon conflicting evidence given at a suppression hearing is binding on this Court, and is not to be reversed absent a clear abuse of discretion.' *Jackson v. State*, 589 So. 2d 781, 784 (Ala. Cr. App. 1991) (citations omitted)."

Rutledge v. State, 651 So. 2d 1141, 1144-45 (Ala. Crim. App. 1994).

Appendix A

A.

Initially, the appellant contends that he did not voluntarily make his statement because he did not fully comprehend the *Miranda*[1] warnings.

> " ' "We have often held that 'the fact that a defendant may suffer from a mental impairment or low intelligence will not, without other evidence, render a confession involuntary.' See *Colorado v. Connelly*, 479 U.S. 157, 107 S. Ct. 515, 520, 93 L. Ed. 2d 473 (1986); *Baker v. State*, 599 So. 2d 60, 63 (Ala. Cr. App. 1991), *State v. Austin*, supra, *Holladay v. State*, 549 So. 2d 122 (Ala. Cr. App. 1988), aff'd, 549 So. 2d 135 (Ala. 1989), cert. denied, 493 U.S. 1012, 110 S. Ct. 575, 107 L. Ed. 2d 569 (1989)."

" '*Youngblood v. State*, 656 So. 2d 385, 387 (Ala. Cr. App. 1993).

> " ' "[A] defendant's mental impairment, even if it exists, is merely one factor affecting the validity of his waiver of rights and the voluntariness of his confession. See generally Annot., 8

1. *Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966).